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May 12, 2008

BY HAND

Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-00001



Re: Docket No. 42104, *Entergy Arkansas, Inc. and Entergy Services, Inc.*
v. Union Pacific Railroad Company and Missouri & Northern Arkansas
Railroad Company, Inc.
Finance Docket No. 32187, *Missouri & Northern Arkansas Railroad*
Company, Inc. – Lease, Acquisition and Operation Exemption – Missouri
Pacific Railroad Company and Burlington Northern Railroad Company

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Dear Secretary Quinlan:

Enclosed for filing in the above-referenced dockets, please find an original and ten copies of the "Public" version of Union Pacific's Reply to Entergy's Motion to Extend Procedural Schedule. UP is separately filing a "Highly Confidential" version under seal.

An additional paper copy of this document is also enclosed. Please return a date-stamped copy to our messenger.

Thank you for your attention to this matter.

Sincerely,

Michael L. Rosenthal

Enclosure

MAY 12 2008

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BEFORE THE
SURFACE TRANSPORTATION BOARD

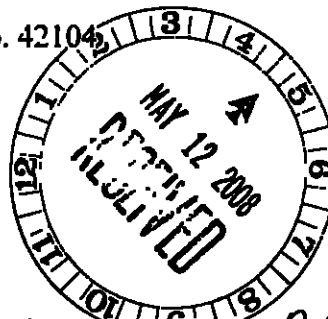
ENTERGY ARKANSAS, INC. and
ENTERGY SERVICES, INC., Complainants,

v.

UNION PACIFIC RAILROAD COMPANY and
MISSOURI & NORTHERN ARKANSAS
RAILROAD COMPANY, INC., Defendants.

MISSOURI & NORTHERN ARKANSAS R.R. –
LEASE, ACQUISITION AND OPERATION
EXEMPTION – MISSOURI PACIFIC R.R.
and BURLINGTON NORTHERN R.R.

Docket No. 42104



Finance Docket No. 32187

222340

**UNION PACIFIC'S REPLY TO ENTERGY'S MOTION
TO EXTEND PROCEDURAL SCHEDULE**

The Board should deny the motion to extend the procedural schedule filed by Entergy Arkansas, Inc., and Entergy Services, Inc., on May 8, 2008 (collectively, "Entergy"). In light of Entergy's representation that its lead outside counsel recently underwent surgery and that his recovery is expected to last two weeks, UP would not object to a two-week extension of the due dates for the parties' evidentiary filings. UP does object, however, to Entergy's request to extend the time allowed for discovery so that Entergy may serve new discovery requests on UP.¹

¹ UP will file a separate reply to Entergy's Second Motion to Compel Union Pacific Railroad Company's Responses to Discovery Requests, dated May 9, 2008, which appears to presume, contrary to the facts, that Entergy has already served new discovery requests on UP.

Entergy's motion is Entergy's second request to extend the procedural schedule in this case. The Board initially established a procedural schedule under which Entergy's opening evidence was due on April 28, 2008. *See* Decision served Mar. 27, 2008. UP was willing to abide by that schedule, but it had previously told Entergy that it would agree to a schedule that would give the parties more time to file their evidence, and thus it did not object when Entergy asked the Board to extend the schedule. *See* Report and Proposed Procedural Schedule, filed Mar. 27, 2008. In response to Entergy's request, the Board extended the procedural schedule by a month and a half. Under the new schedule, discovery closed on May 10, and Entergy's opening evidence is due on June 10. *See* Decision served Apr. 15, 2008.

Entergy offers three reasons for extending the procedural schedule yet again, but none of them justifies allowing Entergy any additional time in which to conduct discovery.²

A. Unavailability of Entergy's Lead Counsel

Entergy reports that its lead counsel for this proceeding underwent surgery and that his recovery is expected to last two weeks. (Mot. at 4.) UP sympathizes with the situation and told Entergy before Entergy filed its motion that UP would not object to an extension of the due dates for evidentiary filings in order to accommodate the recovery period. *See* Letter from Michael L. Rosenthal to Andrew B. Kolesar III, dated May 8, 2008 (attached hereto as Ex. 1). Although the unavailability of Entergy's counsel justifies an extension of the due dates for the parties' evidentiary filings, the discovery period was scheduled to close just three days after

² Even if the Board concludes that UP must respond to new discovery requests from Entergy, it should not extend the procedural schedule. *See, e.g., Canadian Pacific Ry. – Control – Dakota, Minnesota & Eastern R.R.*, STB Fin. Docket No. 35081 (STB served Mar. 27, 2008) (compelling responses to last-minute discovery requests in a proceeding in which there was no scheduled close of discovery, but without adjusting due dates for evidentiary filings).

Entergy's counsel underwent surgery, and thus there is no justification for giving Entergy additional time in which to conduct discovery.

B. Entergy's Need for Materials Responsive to Its First Requests

Entergy argues that an extension of the procedural schedule is necessary because UP had not produced all materials responsive to its first set of discovery requests when it filed its motion (Mot. at 3-4.) However, UP produced all its discovery materials by May 12 – the first business day after the discovery deadline, which fell on a Saturday – with one exception.

The one exception relates to documents reflecting UP payments to M&NA for transporting freight under the UP/M&NA Lease. UP has conducted a reasonable search for that information and has produced machine-readable data back to late 2003. UP has also produced other documents and data, including machine-readable traffic tapes, that Entergy can use to calculate payment information for earlier periods. Finally, in response to the Board's May 7 decision, UP has searched its files for non-machine-readable payment information for those earlier periods. UP believes that it has located some additional payment information, and it expects to produce any responsive documents within the next week.³

In light of the payment information UP has already produced, Entergy has no genuine need for the additional documents. At most, Entergy's interest in obtaining additional documentation would justify a modest extension of the due dates for the evidentiary filings, but

³ The Board's record-retention regulations require UP to maintain such information for only one year. See 49 C.F.R. 1220.6, Item I.3.

no more than the two-week extension to which UP has already agreed; it would not justify an extension of time to allow additional discovery.⁴

C. Entergy's Need for "Follow-Up" Discovery

Entergy also argues that an extension of the procedural schedule is necessary because it needs time to conduct certain "follow-up" discovery, including depositions of UP personnel. (Mot. at 4-7.) However, Entergy's request for "follow-up" discovery is a guise for substantially expanding the scope of discovery.⁵ Entergy is asking for information that it could have requested much earlier, if it planned to abide by the Board's procedural schedule. Entergy has had more than enough time to conduct discovery.⁶ Moreover, as UP will discuss in more detail in response to Entergy's Second Motion to Compel, the new discovery Entergy seeks is not relevant to this case.

Entergy's claim that it needs additional discovery rests entirely on documents that UP produced in response to Entergy's Document Request No. 5. That request sought "any study, analysis or estimate of the expected reduction in cost, cost, income, benefit, margin or return on investment that UP anticipated from entering into the Lease Agreement with M&NA."

⁴ Entergy observes that it has not yet completed its own production of documents in response to UP's requests (Mot. at 3 n 1.) Entergy's lack of diligence in responding to discovery does not justify an extension of time so that Entergy can impose additional discovery burdens on UP.

⁵ UP is certainly willing to respond to legitimate follow-up questions that may arise after the discovery period closes. For example, if Entergy were to have difficulty understanding the data on UP's traffic tapes because it believed the field descriptions were inadequate, UP would work with Entergy to resolve such issues, notwithstanding the official close of discovery.

⁶ Entergy did not serve its first requests for discovery until March 17, almost one month after it filed the Complaint on February 19, 2008. Moreover, UP responded to those requests promptly. UP served written responses and objections on April 16, 2008 – the date requested by Entergy – and UP began producing responsive materials just two weeks later.

UP produced documents in response to Entergy's Request No. 5 in order to avoid discovery disputes, notwithstanding our view that information regarding UP's expectations when it entered the UP/M&NA Lease are not relevant to this proceeding. Specifically, UP produced a document titled "Approval for Line Disposition" and accompanying analyses. In transmitting the documents, UP reported that it "had not located any documents that reflect the final lease terms, particularly with respect to M&NA's handling of Entergy coal traffic." (Mot. at 1, Ex. 2 (Letter from Michael L. Rosenthal to Andrew B. Kolcsar III, dated May 2, 2008).)

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Entergy also claims that UP's production is "incomplete," apparently because UP has not produced any pre-transaction analyses of certain issues in response to Request No. 5, and Entergy apparently believes that such analyses might exist. (Mot. at 4.) But as UP explained to Entergy before Entergy filed its motion, UP conducted a reasonable search and has produced the non-privileged, responsive documents it located in response to Entergy's Request No. 5. If UP had located other non-privileged documents that were responsive to Request No. 5, UP would have produced them already. *See* Ex. 1, p. 2.

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In addition, UP's production has apparently prompted Entergy to think up a series of new, broader discovery requests, but Entergy could have asked for the information it is now seeking when it served its first requests (or even earlier, as Entergy did not serve even its first requests until a month after filing the Complaint). If Entergy had made its new requests in a timely manner, the parties could have addressed them, and the Board could have resolved any disputes, if necessary, within the discovery period established by the Board.

For example, Entergy initially asked for "studies and analyses" of the expected benefits UP anticipated from the UP/M&NA Lease. Entergy's motion and its letter indicate that Entergy now wants to review "all support and all workpapers for the analyses." Entergy did not have to see UP's production to recognize that it might want workpapers. If Entergy had made its request earlier, UP could have determined whether the documents even still existed and whether to object based on relevance and burden, and the Board could have resolved any disputes within the established discovery period.⁸

As another example, Entergy now apparently wants to analyze the course of the parties' negotiations – Entergy's letter asks for drafts of the lease and correspondence between UP and M&NA. This information is not called for by Request No. 5 or any other request, and Entergy never explains how it is relevant. More important, Entergy could have asked for such documents much earlier, UP could have determined whether they still existed and whether to object to the request based on relevance and burden, and the Board could have resolved any disputes within the established discovery period.

⁸ It is unclear whether UP has retained "all support and all workpapers" for these fifteen-year-old analyses. These analyses were created to support an internal decisionmaking process, not testimony in an agency proceeding where discovery of workpapers is commonplace.

As a final example, Entergy is apparently no longer happy with its decision to limit its Request No. 5 to studies and analyses regarding UP's expectations when it entered into the UP/M&NA Lease. Entergy now wants UP to produce documents – not limited to studies and analyses, and in addition to the fifteen years of traffic and payment data that UP has produced – to determine whether UP's anticipated benefits were realized. Once again, Entergy could have asked for such documents much earlier, UP could have determined whether they existed and whether to object to the requests based on relevance and burden, and the Board could have resolved any disputes within the established discovery period.

Finally, Entergy claims it needs to depose UP employees regarding the documents UP produced in response to Request No. 5 – *i.e.*, documents reflecting UP's expectations when it entered into the UP/M&NA Lease. Entergy must have anticipated that it would want to depose someone on this issue, especially given its claim that this issue is “central” to its case. (Mot. at 5.) Entergy cannot credibly claim it was waiting to see what documents UP produced before it requested depositions because it could not have known whether UP would have any responsive documents. As UP will discuss in its response to Entergy's Second Motion to Compel, UP disagrees with Entergy's contention that this information Entergy seeks through depositions is relevant, but for purposes of this motion, the more important point is that Entergy could have made a more timely request for depositions, and the parties could have addressed that request within the discovery period established by the Board.

For the reasons discussed above, the Board should not extend these proceedings so Entergy can expand the scope of discovery, particularly because Entergy could have readily pursued the discovery it now seeks without creating any additional delay.

Respectfully submitted,



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Attorneys for Union Pacific Railroad Company

May 12, 2008

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that on this 12th day of May, 2008, I caused a copy of Union Pacific's Reply to Entergy's Motion to Extend Procedural Schedule to be served electronically and by first class mail postage prepaid on counsel for Entergy Arkansas, Inc. and Entergy Services, Inc., and counsel for Missouri & Northern Arkansas Railroad Company, Inc.

A handwritten signature in black ink, appearing to read "Michael L. Rosenthal", written over a horizontal line.

Michael L. Rosenthal

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May 8, 2008

VIA EMAIL

Andrew B. Kolesar III, Esq.
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Re: Docket No. 42104, *Entergy Arkansas, Inc. and Entergy Services, Inc.*
v Union Pacific Railroad Company and Missouri & Northern Arkansas
Railroad Company, Inc.
Finance Docket No. 32187, *Missouri & Northern Arkansas Railroad*
Company, Inc – Lease, Acquisition and Operation Exemption – Missouri
Pacific Railroad Company and Burlington Northern Railroad Company

Dear Andy.

This responds to your letter of May 7, 2008. Your letter sets forth several new discovery requests, including requests for depositions of Union Pacific personnel, that seem to be designed to justify Entergy's effort to extend the procedural schedule in this case for the second time. We do not believe that any additional discovery is appropriate or that it would be appropriate to extend the procedural schedule in order to accommodate additional discovery.

The Board initially established a procedural schedule under which Entergy would file opening evidence by April 28, 2008. Union Pacific had previously told Entergy that we would agree to a schedule that would give Entergy more time, and thus we did not object when Entergy asked the Board to modify the schedule so discovery would close on May 30 and Entergy would file opening evidence on July 1. In response to Entergy's request, the Board extended the procedural schedule by a month and a half, so discovery would close on May 10 and Entergy would file opening evidence on June 10. We believe there is no good reason to extend the schedule yet again to accommodate Entergy's new discovery requests. We respond to your specific points in detail below.

A. Divisions

As Union Pacific explained in response to Entergy's motion to compel, we have continued to search for information documenting Union Pacific payments to M&NA in response to Entergy's Request Nos. 6 and 9(t). As a result of those efforts, Union Pacific has located certain electronic records that appear to correspond to the documents attached to your letter as Exhibit 1. Union Pacific will produce those records. Of course, Union Pacific will also produce any additional documents located in compliance with the Board's decision served May 7.

B. Approval for Line Disposition

Union Pacific's production of its "Approval for Line Disposition" and the accompanying analyses fully satisfied Union Pacific's obligation to produce documents in response to Entergy's Request No. 5. The extensive list of "follow-up" questions in your letter are new discovery requests that Entergy could have and should have made at the time of its initial discovery requests, particularly if Entergy expected to abide by the Board's procedural schedule.

Entergy's Request No. 5 asked Union Pacific to produce "any study, analysis or estimate of the expected reduction in cost, cost, income, benefit, margin or return on investment that UP anticipated from entering into the Lease Agreement with M&NA." In my May 2, 2008 letter transmitting the first set of materials Union Pacific was producing in response to Entergy's discovery requests, I explained that Union Pacific was producing the "Approval for Line Disposition" and the accompanying analyses in response to Entergy's Request No. 5. If Union Pacific had located other non-privileged documents that were responsive to Request No. 5, they would have been produced.

Union Pacific's production has apparently prompted Entergy to think up a series of new discovery requests, but Entergy could have requested the same information it now seeks when it served its first discovery requests back on March 17, at which point the parties could have addressed the requests without any need to extend the procedural schedule for a second time.

For example, Entergy is apparently no longer content to review Union Pacific's studies and analyses of the benefits anticipated from the UP/M&NA Lease, and it now wants to review "all support and all workpapers for the analyses." This new request goes beyond Entergy's initial request for "any study, analysis or estimate."

As another example, Entergy is apparently no longer content to analyze the actual terms of the UP/M&NA Lease, and it now wants to analyze the course of the parties'

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Andrew B. Kolesar III, Esq.

May 8, 2008

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negotiations by reviewing drafts of the UP/M&NA Lease and correspondence between Union Pacific and M&NA. Again, this request goes beyond Entergy's initial request.

As still another example, Entergy is apparently no longer content to review documents regarding Union Pacific's anticipated benefits from entering into the UP/M&NA Lease, and it is now asking for additional Union Pacific records, in addition to the fifteen years of traffic and revenue data that Union Pacific has agreed to produce, to test whether the anticipated benefits were realized. Once again, this request goes beyond Entergy's initial request.

Union Pacific conducted a reasonable search and produced the responsive documents that it located in response to Entergy's Request No. 5. Union Pacific produced those documents to avoid discovery disputes, notwithstanding our view that the information is not relevant to this proceeding. We are not willing to allow Entergy to expand the scope of its initial discovery requests under the guise of "follow-up" questions, particularly when Entergy could have sought the requested information long ago and without the need for a second extension of the procedural schedule in this case.

C. Depositions

Your May 7 letter also for the first time requests depositions of one or more Union Pacific employees regarding the documents produced in response to Request No. 5 – that is, documents reflecting Union Pacific's analysis of anticipated benefits from entering into the UP/M&NA Lease. Entergy could have requested depositions on this topic when it requested document discovery from Union Pacific, and Union Pacific could have addressed that request within the timeframe for discovery established by the Board. As discussed above, we are not willing to allow Entergy to use last-minute discovery requests as an excuse for extending the procedural schedule.

D Schedule

Finally, your May 7 letter, as modified by an email you sent earlier today, asks whether Entergy can represent to the Board that Union Pacific agrees with, or at least does not object to, Entergy's request to extend the procedural schedule. We appreciate your courtesy in soliciting our views on the proposed modified schedule. The dates proposed in your email would create a scheduling conflict for several lawyers involved in this case who are also involved in a trial that is scheduled to begin on August 11. A possible "fix" might be to move Entergy's opening evidence and the railroad reply evidence one week earlier.

However, for the reasons discussed above, Union Pacific will object to any request by Entergy to extend the procedural schedule to allow time for additional discovery. Moreover, because Union Pacific will object to Entergy's request for additional discovery in

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Andrew B. Kolesar III, Esq

May 8, 2008

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general and because we may raise specific objections based on burden, relevance, and other grounds to some or all of the additional discovery requests that Entergy ultimately serves, it is questionable whether even the extended schedule you have proposed is realistic.

In a second email you sent today, you reported that one of your colleagues who is working on this case had surgery yesterday and will be "out of commission for two weeks." If those circumstances would make it difficult for Entergy to file its evidence in accordance with the current schedule, Union Pacific would not object to a two-week extension of the dates for filing evidence. However, Union Pacific would object to any suggestion that the additional time could be used to conduct additional discovery.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael L. Rosenthal", written in a cursive style.

Michael L. Rosenthal

cc: C. Michael Loftus, Esq.
Frank J. Pergolizzi, Esq.